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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 405

FRANK MEKOLICHICK, JR., AND DAVID CHARLES WENNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 15–20) is reported at 234 F. 2d 71. The opinion of the District Court in the *Mekolichick* case (Pet. App. 24–28) is not reported. The opinion in the *Wenner* case (Pet. App. 29–35) is reported at 134 F. Supp. 447.

JURISDICTION

The judgments of the Court of Appeals were entered on June 1, 1956 (Pet. App. 21, 22), and an order denying a joint petition for a rehearing was denied on August 15, 1956 (Pet. App. 23). The joint petition for a writ of certiorari was filed on

September 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether it was necessary for the District Court to decide whether petitioners, as draft registrants, had been denied procedural due process by an improper limitation of discussion before the local board of their claims for classifications as ministers, where on motions for acquittal they voluntarily withdrew such claims as being without merit.

2. Whether petitioners, successful in obtaining the I–O [conscientious objector] classifications which they sought, were prejudiced by failure to have the names and addresses of "advisors" posted in the local board office as provided by the then applicable regulation.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Universal Military Training and Service Act and the regulations involved are set forth in the Appendix, *infra,* pp. 13–15.

STATEMENT

Petitioners Mekolichick and Wenner were charged in indictments returned in the United States District Court for the Middle District of Pennsylvania with unlawfully leaving and quitting civilian work at Mont Alto State Tuberculosis Sanatorium, to which they had been assigned by their local draft board, in violation of Section 12 (a) of the Universal Military Training and Service Act (*infra,* p. 13), and the Regulations issued pursuant thereto (M. 3; W. 4).[1]

[1] "M." refers to the Mekolichick record; "W." refers to the Wenner record.

Both cases were tried before the court without a jury, and each petitioner's selective service file was introduced in evidence (M. 1, 4; W. 1, 5).

Motions for judgment of acquittal were denied (M. 30–31, 36; W. 32–33, 41); sentences for three years' imprisonment were imposed (M. 37; W. 42); and the convictions were unanimously affirmed (Pet. App. 21, 22).

(A). *Mekolichick.*

In his classification questionnaire filed with his local board on October 10, 1951, petitioner Mekolichick stated in answer to Series VI that he served regularly as a minister for Jehovah's Witnesses since July 1, 1940, and that he was ordained on August 22, 1943 (M. 10, 11–12). In answer to Series VII, he gave his occupation as storeroom clerk, at which he averaged 50 hours per week, and listed his other business as ministry work (M. 12–13). In Series XIV, he claimed conscientious objection to war (M. 14).

On October 23, 1951, petitioner was classified I–A by the local board (M. 14). On February 3, 1953, he appeared before the local board for a hearing. He told the board that he had been an ordained minister since he was 11 years old and that he had been a Jehovah's Witness since birth. As a basis for his conscientious objector claim, he stated that his religion would not allow him to fight in any war. He mentioned that he was employed as a full-time store clerk earning $88 per week. The local board continued him in a I–A classification (M. 15, 22, 23).

In a letter dated February 9, 1953, to the local board, petitioner appealed his I–A classification. He stated that he was surprised that he did not receive a minister's classification, since the board members said, "We do not doubt that you are a minister," and "We are familiar with your religion." Petitioner repeated his conscientious objector claim, concluding his letter, "I believe that a classification of I–O [conscientious objector] could have been given me, by the local board at the least" (M. 23–24). On July 15, 1953, the appeal board, by a 4–0 vote, granted him the I–O classification he requested (M. 25).

Petitioner was ordered by his local board to report for civilian employment at the Mont Alto Sanatorium on September 11, 1953 (M. 26). He reported and worked at the sanatorium until he voluntarily resigned on January 8, 1954. He gave as his reason for leaving the fact that his "ministerial work [had] suffered greatly" while he was employed at the sanatorium, and stated that he wanted to spend more time as a minister "no matter what the consequence" (M. 27–29, 5).

At the trial, petitioner testified on direct examination that his hearing before the local board on February 3, 1953, lasted only about 10 or 15 minutes. According to petitioner's version, he started to tell the board members about his work in order to show that he was a minister, but was cut off. One member said, "We are familiar with your religion", and another said, "We don't doubt you are a minister" (M. 6). Petitioner testified that he also wanted to show parts of his selective service file indicating that

he was a minister, but that the board did not allow him to do this (M. 8). On cross-examination, this colloquy occurred (M. 9–10):

> Q. And you still tell us that your ministerial status was not considered by your Local Board?
>
> A. That is correct.
>
> Q. The Board never restricted you in any information that you might submit, did it? It never said you can't file this paper or you can file that paper, did it?
>
> A. No.
>
> Q. Whenever you wanted to be heard, the Board heard you, did it not?
>
> A. For my hearing?
>
> Q. Yes.
>
> A. Yes.

Petitioner testified that he had inspected the bulletin board at the draft board office, and that there were no posted notices showing who was the legal advisor for registrants (M. 9).

(B). *Wenner.*

In his classification questionnaire filed with the local board on March 14, 1951, petitioner Wenner stated in answer to Series VI that he was a student preparing for the ministry under the direction of the Watchtower Bible and Tract Society, and that he was attending Kingdom Hall Theocratic Ministry School at Hazleton, Pennsylvania (W. 12). In Series VII, he indicated his occupation as farm laborer, and stated that the total value of crops sold from the farm was "none" (W. 12, 13). In Series XIV, he claimed conscientious objection to war (W. 14). On

March 26, 1951, he filed his SSS Form 150 asserting his conscientious objector views (W. 16–22).

On June 5, 1951, the local board classified petitioner I–A (W. 15). On July 10, 1951, he was granted a hearing before the local board, at which he stated that his occupation was farming and timbering, and that he was entitled to a conscientious objector classification. At this hearing, another Jehovah's Witness stated that petitioner was a "part-time minister" (W. 22–24). The board continued him in the I–A classification (W. 15).

On November 25, 1952, petitioner appeared before the local board for another hearing. He requested a I–O [conscientious objector] classification (W. 24–25, 15). On May 28, 1953, the appeal board by a 4–0 vote granted him the I–O classification he requested (W. 26).

On December 14, 1953, petitioner reported to Mont Alto Sanatorium for the civilian work assignment given to him (W. 27, 28). On January 8, 1954, he voluntarily resigned from his employment for "[n]o good reason," was warned that he was violating the Universal Military Training and Service Act, and left the sanatorium two days later (W. 28, 31, 6, 7).

At the trial, petitioner testified on direct examination that at the time of his July 1951 and November 1952 appearances before the board, when he started to quote the Bible to show that he was a minister, a board member said he was not interested as far as the Bible was concerned, but wanted to know what right under the law petitioner had as a conscientious objector. Petitioner testified that, if he had been per-

mitted, he was prepared to tell the board that he had been a house-to-house preacher, that he had gone to Theocratic Ministry School, and had engaged in Watch Tower studies. Petitioner testified further that the board prevented him from pointing out material in his file to show he was a minister (W. 7, 8). On cross-examination, this colloquy occurred (W. 9):

> Q. I notice from your Selective Service file that you filed many documents and papers with your Local Board, is that true, you did?
>
> A. Yes.
>
> Q. Did the Board restrain you from filing information with it?
>
> A. No.
>
> Q. Did it provide ample opportunity to be heard under the regulations?
>
> A. I would say they did.

It was stipulated by counsel, after the case was under submission, that if petitioner Wenner were recalled as a witness he would testify, as had petitioner Mekolichick, that he made an inspection to see if there were any posted notices at the draft board office telling who was the legal advisor for registrants of that board, but that he found none; and that no draft board member or clerk ever told him that there was a legal advisor, or gave the advisor's name (W. 34, 33).

In each case, Claim No. 1 in the motion for acquittal in the District Court was that the local board had denied petitioner procedural due process contrary to regulation, 32 C. F. R. 1624.2 (*infra*, pp. 13–15), when it refused him the right to discuss his minis-

terial status (M. 30; W. 32). In the original District Court opinions, this sentence appeared: "Defendant has frankly, and in my opinion very properly, withdrawn Claim No. 1 (ministerial)" (Pet. App. 27, 33). After petitioners' counsel sought a change of this, this sentence was amended to read: "Defendant has frankly, and in my opinion very properly, withdrawn any contention that the draft board illegally denied the ministerial claim because it was without merit which, in my opinion, was a withdrawal of Claim No. 1 made by the defendant" (M. 36–37; W. 41).

ARGUMENT

1. There is no merit to petitioners' principal contention that both the District Court and the Court of Appeals erred in not ruling upon the validity of Claim No. 1 of their motions for acquittal asserting that they were denied the procedural due process right of discussing their ministerial claims at appearances before the local board (see *supra*, pp. 7–8) (Pet. 2, 9–14).

In the District Court, petitioners, through their attorney, voluntarily withdrew any contention that the draft board had illegally denied their claims for ministerial classifications. *Supra*, pp. 7–8. They did not then, nor do they now, assert that there is basis in fact for the ministerial classifications which they initially sought. In view of the virtually full-time nature of their secular occupations, they could not have very well done otherwise. Cf. *Dickinson* v. *United States*, 346 U. S. 389, 395. That being so, it was manifestly unnecessary for the District Court or the Court of Appeals to follow the useless procedure of deciding

whether petitioners were denied a proper hearing to discuss before the local board their ministerial claims, which they themselves had conceded to be meritless.[2]

This Court has never held, as petitioner implies (Pet. 13), that a registrant is entitled to challenge denial of his procedural rights by a local board, even though he does not contend that he has been illegally or improperly classified. In both *Simmons* v. *United States*, 348 U. S. 397, and *Gonzales* v. *United States*, 348 U. S. 407, the registrants vigorously contended that their I–A classifications were illegal, and succeeded in having their convictions reversed by reason of denial of procedural rights in attempting to establish conscientious objector classifications. Similarly, the asserted conflict with *Gerdes* v. *Lustgarten*, 266 U. S. 321 (see Pet. 9, 10, 13) is not present. There, under an entirely different factual situation, the case was remanded for the District Court to decide whether a bankrupt's financial statement was materially false and whether the bank had made loans in reliance upon

[2] In any event, the record does not show that petitioners were improperly limited at the local board hearings in the presentation of their claims for ministerial classification. They rely on their self-serving testimony on direct examination in response to leading questions, but on cross-examination at the trials petitioners indicated that the local board did not restrict them in any way in their submission of information, and granted a hearing whenever they desired to be heard (see *supra*, pp. 5, 7) (M. 9–10; W. 9). At Mekolichick's February 1953 hearing before the local board, he was permitted to explain that he was an ordained minister and to present a corroborating certificate as to this, by the president of the Watchtower Bible and Tract Society (M. 22, 23). And at Wenner's July 1951 hearing, another Jehovah's Witness was permitted to state reasons for Wenner's classification as a minister (W. 23).

it, so that his discharge should be denied. The remand was necessary for decision of the pivotal substantive question upon which the case turned.

2. Petitioners do not even argue, but merely state as a question presented (see Pet. 2), their other contention, *i. e.*, that they were denied due process of law by reason of the failure to appoint "advisors to registrants" and to post their names and addresses in the local board office in accordance with the then applicable regulation, 32 C. F. R. 1604.41 (*infra*, p. 13).[3]

In construing this regulation as it read before its amendment (see footnote 3), the courts have held that failure to appoint advisors or to post their names and addresses is not a denial of due process to the registrant in the absence of an affirmative showing of prejudice. *Clark* v. *United States* (C. A. 9, decided June 20, 1956, petition for a writ of certiorari pending, No. 337, this Term); *Uffelman* v. *United States*, 230 F. 2d 297, 300–302 (C. A. 9); *Kaline* v. *United States*, 235 F. 2d 54 (C. A. 9); *Rowton* v. *United States*, 229 F. 2d 421, 422 (C. A. 6), certiorari denied, 351 U. S. 930.

Petitioners have shown no prejudice whatever from noncompliance with the regulation. They both re-

[3] This regulation was changed on January 31, 1955 [E. O. 10594, 20 F. R. 735] from "shall" to "may" in order that appointments would be made only where the community situation demonstrated a need for such advisors. We have been advised that it has been the experience of many State Headquarters that the local board clerk, the Government Appeal Agent, and the local board members have ample time to advise registrants as to their rights and duties and to assist them in filling out questionnaires and other forms.

ceived the I–O classifications which they sought, and it is not easy to see how counsel or advice from officially appointed advisors would have improved upon this desired result. As the court below said (Pet. App. 18): "The facts and proper inferences therefrom strongly indicate expert assistance to [petitioners] in the preparation of their answers to the questionnaires and that nothing was neglected in the full presentation of their claims."

Moreover, the testimony of both petitioners was to the effect that at the time when—presumably with knowledge of the regulation—they inspected the bulletin board in the local board office for a posted list of advisors, they did not find any. The record is not clear, however, as to when these inspections were made. Assuming that they were made while petitioners' cases were still pending before the Selective Service System (as they contended in the court below), if petitioners had been acting in all good faith they would have immediately requested such a list from some local board member, clerk, or the Government Appeal Agent, or asked for other assistance. There is no showing, however, that they did this or that selective service officials refused them any requested assistance.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1956.

APPENDIX

Statute and Regulations Involved

Section 12 (a) of the Universal Military Training and Service Act, 62 Stat. 604, 622 [50 U. S. C. App. 462 (a)] provides:

> Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations of the Selective Service System:

32 C. F. R. [1951 ed.] 1604.41:

> *Appointment and Duties.* Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

32 C. F. R. [1951 ed.] 1624.2 provides:

> *Appearance before local board.* (a) At the time and place fixed by the local board, the

registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the "Minutes of Actions of Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies

the registrant, or determines not to reopen the registrant's classification, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

(e) Each such classification or determination not to reopen the classification made under this section shall be followed by the same right of appeal as in the case of an original classification.

U. S. GOVERNMENT PRINTING OFFICE: 1956